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Open-ended Working Group taking forward multilateral nuclear disarmament negotiations[1]

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Item 5 of the agenda
Taking forward nuclear disarmament negotiations

Elements for a treaty banning nuclear weapons

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I. Introduction

1. Nuclear weapons pose a unique existential threat to all humanity. No nation is invulnerable to their catastrophic, far-reaching and long-lasting effects. Thus, every nation, whether nuclear-free or nuclear-armed, small or large, has a direct interest in realizing a world without these indiscriminate, inhumane weapons. Moreover, as States parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), we are all legally bound to pursue negotiations in good faith on effective measures for nuclear disarmament. The three recent conferences on the humanitarian impact of nuclear weapons, hosted by Norway in March 2013, Mexico in February 2014, and Austria in December 2014, underscored the urgent need for new norms and legal provisions to stigmatize, prohibit, and eliminate nuclear weapons.

2. This open-ended working group has a mandate "to substantively address concrete effective legal measures, legal provisions, and norms that will need to be concluded to attain and maintain a world without nuclear weapons". We propose that discussions focus on: (a) identifying the deficiencies in the existing legal framework governing nuclear weapons; (b) setting out the elements to be contained in a treaty banning nuclear weapons; and (c) developing a road map for concluding such a treaty. We believe that the debate should no longer be about whether a global ban on nuclear weapons is necessary, but rather how we can achieve it and what provisions it should contain. The overwhelming majority of Member States of the United Nations have endorsed the humanitarian pledge, an undertaking to cooperate in efforts "to fill the legal gap for the prohibition and elimination

[1] Established pursuant to resolution 70/33 of the General Assembly of the United Nations.

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of nuclear weapons".[2] We must now commence the necessary practical work to achieve this goal.

II. The unique perspective of Pacific island States

Legacy of nuclear testing

3. Pacific islanders have suffered greatly as a result of half a century of nuclear testing in our region. The lived experience of our people informs our policies on nuclear disarmament and motivates us to contribute substantively to the work of bodies such as this. From 1946 to 1996, some 300 nuclear test explosions were conducted at Bikini, Enewetak, Kiritimati, Kalama, Malden, Moruroa, and Fangataufa in the Pacific. Their impact on our fragile ecology and the physical health and mental wellbeing of our people has been profound. We continue to experience epidemics of cancers, chronic diseases and congenital abnormalities as a result of the radioactive fallout that blanketed our homes and the vast Pacific Ocean on which we depend for our livelihoods. Entire atolls remain unsafe for habitation, for agricultural production, and for fishing. Some islanders have been permanently displaced from their homes and disconnected from their indigenous way of life. They have suffered, and continue to suffer, untold anguish, heartache, and pain.

4. This year marks two decades since the last of the nuclear test explosions was conducted in the Pacific, at Moruroa atoll in January 1996. Though there have been some attempts to remediate the areas most heavily affected by radioactive contamination, it will never be possible to restore fully our precious islands to their former pristine state, nor to undo the harm inflicted upon our people over generations. We can, however, work with other nations to ensure that nuclear weapons are never used again, whether in testing programmes or in warfare. This can be guaranteed only through achieving their complete and irreversible elimination. For the sake of present and future generations, we must free the world of the nuclear menace. Pacific island States stand ready to join multilateral negotiations towards this end.

The Treaty of Rarotonga

5. The Treaty of Rarotonga has established the South Pacific as an internationally recognized nuclear-weapon-free zone. This important regional treaty, with 13 States parties, opened for signature on 6 August 1985, the 40th anniversary of the atomic bombing of Hiroshima, and entered into force the following year. Like other nuclear-weapon-free zone treaties, it offers a useful starting point for discussions on the elements for a global treaty banning nuclear weapons. We encourage all States to examine its provisions. Nuclear-weapon-free zones have been essential tools for establishing strong regional norms against the use, testing, and possession of nuclear weapons. No nation belonging to such a zone has acquired nuclear weapons. It is high time, we believe, for a new legally binding instrument that would transform these regional norms into global norms.

6. The Treaty of Rarotonga prohibits States within the zone from, *inter alia*, manufacturing or otherwise acquiring, possessing, or having control over nuclear weapons; seeking or receiving any assistance in the manufacture or acquisition of nuclear weapons, or taking any action to assist or encourage the manufacture or acquisition of nuclear weapons; allowing nuclear testing in their territory, or assisting or encouraging such testing;

[2] A/RES/70/48, "Humanitarian pledge for the prohibition and elimination of nuclear weapons", adopted 7 December 2015.

allowing nuclear weapons to be stationed in their territory; and dumping radioactive wastes and other radioactive matter at sea anywhere within the zone, or assisting or encouraging such dumping. It also places constraints on the export of "special fissionable material" and related equipment. We expect that similar prohibitions would be included in a global treaty banning nuclear weapons.

The pursuit of nuclear disarmament

7. It is a matter of deep concern that multilateral negotiations for nuclear disarmament remain at a standstill, with no concrete outcomes having been achieved within the United Nations framework for almost two decades. During this period of diplomatic inaction, we have witnessed a major re-investment in global nuclear forces that can be described only as a new nuclear arms race. All nuclear-armed States appear intent on retaining their nuclear arsenals for many decades to come. For this reason, the Republic of the Marshall Islands initiated legal proceedings in April 2014 in the International Court of Justice (ICJ) aimed at compelling the nuclear-armed States to fulfil their legal obligations under the Treaty on the Non-Proliferation of Nuclear Weapons and customary international law.[3] These cases complement and reinforce the efforts of a growing number of nuclear-free States to negotiate a treaty banning nuclear weapons.

III. Elements for a treaty banning nuclear weapons

A comprehensive, universal prohibition

8. In 1996 the International Court of Justice issued a landmark advisory opinion on the legality of the threat or use of nuclear weapons.[4] It stated that "the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law". It noted, however, that "there is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such". In this respect, nuclear weapons differ from the other types of weapons of mass destruction, which are comprehensively and universally prohibited under the Biological Weapons Convention of 1972 and Chemical Weapons Convention of 1993. We consider this an unacceptable anomaly of international law — that the very worst weapon of mass destruction has not yet been prohibited in a similar fashion.

9. A treaty banning nuclear weapons would fill this legal gap by building on and reinforcing existing legal instruments and rules governing nuclear weapons, including the Treaty on the Non-Proliferation of Nuclear Weapons, the Comprehensive Nuclear-Test-Ban Treaty (CTBT), regional nuclear-weapon-free zone treaties, and the general rules and principles of international humanitarian law. The new treaty would, among other things, clarify the illegality of the use of nuclear weapons, which remains the subject of some disagreement among States, as the International Court of Justice was unable to declare definitively that the use of nuclear weapons would be unlawful in all circumstances. The treaty would remove the apparent uncertainty that exists with regard to the illegality of use

[3] "Obligations concerning negotiations relating to cessation of the nuclear arms race and to nuclear disarmament", Marshall Islands v. Pakistan, Marshall Islands v. India, Marshall Islands v. United Kingdom: http://www.icj-cij.org/docket/index.php?p1=3&p2=1.

[4] "Legality of the threat or use of nuclear weapons", advisory opinion of 8 July 1996: http://www.icj-cij.org/docket/files/95/7495.pdf.

"in an extreme circumstance of self-defence, in which the very survival of a State would be at stake".

10. Importantly, the treaty would prohibit not only the use of nuclear weapons, but also, *inter alia*, their development, production, testing, acquisition, stockpiling, transfer, deployment, and financing, as well as assistance, encouragement, or inducement of these acts. Some of these prohibitions can already be found in a number of existing legal instruments, but typically they are partial in nature or apply only to particular States. A global treaty banning nuclear weapons would address the fragmentary and, in some respects, discriminatory nature of the existing regime by closing loopholes and applying the same rules to all States equally. It would contribute to the progressive stigmatization of nuclear weapons, and constitute an "effective measure" for nuclear disarmament as required by article VI of the Treaty on the Non-Proliferation of Nuclear Weapons.

11. We are convinced that the total prohibition of nuclear weapons through a universal treaty is the only responsible course of action in light of the catastrophic humanitarian consequences of such weapons. Anything less than a comprehensive ban (for example, a ban only on use or a ban only on certain types of nuclear weapons) would be inadequate. Moreover, there is no justification for further delaying the prohibition of a weapon that clearly poses a grave humanitarian threat. The overwhelming majority of Member States of the United Nations have agreed that nuclear weapons are "inherently immoral" and "indiscriminate" in nature.[5] A ban would allow nuclear-free States to formalize their total rejection of nuclear weapons, not only for themselves or their region but for all States, and to contribute to the creation of an effective international regime to prevent the perpetuation of nuclear weapon possession. As the chair of the second Conference on the Humanitarian Impact of Nuclear Weapons, held in Nayarit, Mexico, in February 2014, concluded: "[I]n the past, weapons have been eliminated after they have been outlawed. We believe this is the path to achieve a world without nuclear weapons."[6]

12. We recognize that a treaty banning nuclear weapons, like any other treaty, would bind only its States parties. However, through its normative force, it could also have a profound impact on the behaviour of States that may initially choose not to join. Based on the experience of treaties relating to other types of weapons, it is likely that some States, while opting to remain outside the treaty, would feel compelled to comply with its provisions given pressure from the international community and the public. We anticipate that not every State will agree to participate in the negotiations and to join the treaty when it opens for signature. Instead, support will need to be built over time, up until the point of achieving universal membership.

13. In assessing the merits of a treaty banning nuclear weapons, we must begin by assessing the nature and scope of the problem that we seek to overcome. It is a common error to assume that our challenge is limited to persuading the nuclear-armed States to alter their behaviour. In reality, a larger number of States contribute to nuclear dangers and impede progress towards disarmament through policies and practices that endorse the indefinite retention and potential use of nuclear weapons. A treaty banning nuclear weapons would aim to bring these States into line with the mainstream of the international community and, in so doing, to influence also the behaviour of nuclear-armed States.

14. The problematic policies and practices of this wider circle of States include: (a) stationing another State's nuclear weapons on their territory; (b) assisting with nuclear targeting; (c) participating in nuclear war planning; (d) training personnel to take control of and use another State's nuclear weapons in a crisis; (e) subscribing to the doctrine of

[5] A/RES/70/50, 'Ethical imperatives for a nuclear-weapon-free world', adopted on 7 December 2015.
[6] Chair's summary, 14 February 2014: http://en.s e.gob.mx/index.php/humanimpact-nayarit-2014.

"extended nuclear deterrence"; (e) permitting vessels with nuclear weapons into their ports and territorial seas; (f) permitting aircraft with nuclear weapons into their airspace; (g) permitting nuclear weapons to be transported through their territory; (h) contributing funds for the manufacture and modernization of nuclear weapons and their delivery vehicles; (i) supplying nuclear-capable delivery vehicles to nuclear-armed States; and (j) providing special fissionable material to nuclear-armed States in the absence of comprehensive safeguards. A treaty banning nuclear weapons should prohibit all such policies and practices, which severely undermine our work to achieve a nuclear-weapon-free world.

An obligation to eliminate nuclear weapons

15. The treaty, while prohibiting the possession of nuclear weapons by any State, should allow for the signature and ratification by nuclear-armed States on the condition that they accept an obligation to eliminate their arsenals within an agreed timeframe and in a specified manner. The treaty would not need to include all these disarmament provisions, including verification mechanisms, at the outset. Rather, the States parties could develop such provisions as part of the implementation process for the treaty, through protocols or other relevant legal instruments. This would allow the basic elements of the treaty to be adopted relatively quickly without needing to reach agreement initially on the full range of provisions for attaining a nuclear-weapon-free world.

Recognition of the rights of victims

16. The humanitarian pledge acknowledges "the unacceptable harm that victims of nuclear weapons explosions and nuclear testing have experienced" and the fact that "the rights and needs of victims have not yet been adequately addressed". There is currently no international legal instrument to support the victims of nuclear weapons. This is a significant part of the "legal gap" that needs filling. A treaty banning nuclear weapons could include, for example, obligations to provide assistance to victims towards the fulfilment of their rights; obligations to provide support to other States in such efforts; responsibilities to report on the work being undertaken; and regular meetings where a community of practice would share experience and work to strengthen collective action.[7] The treaty should also include obligations to address damage to the environment. These provisions are of particular importance to Pacific island States given the impact of nuclear testing in our region.

Signature, ratification, and entry into force:

17. The treaty should be open to all States for signature and ratification, in. Any State that has not signed and ratified the treaty prior to its entry into force should be permitted to accede to it at any time thereafter. The treaty should enter into force following ratification by a specified number of States. In line with the principle of the sovereign equality of States, there should be no differential treatment of ratifying States. We would not support, for example, efforts to impose a requirement that all nuclear-armed States must ratify the treaty before it can enter into force. The ongoing challenges to secure the entry into force of the Comprehensive Nuclear-Test-Ban Treaty (CTBT) should serve as an important lesson in this regard.

[7] See "'Victim assistance' in a treaty banning nuclear weapons", January 2015: http://www.article36.org/wp-content/uploads/2015/01/victims-nuclear-weapons.pdf.

Oversight, review, and implementation

18. An agency should be established, possibly under the auspices of the United Nations, to promote the universalization and full implementation of the treaty and to provide secretarial support for periodic review conferences of States parties. It should be empowered to monitor and verify compliance with the treaty in cooperation with other relevant agencies, such the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO). This verification role will be important even if no nuclear-armed State has signed and ratified the treaty, as it will be necessary to verify that all States parties are in full compliance with the prohibitions in the treaty. The agency should also have a mandate to educate the global public about the role of the treaty, as well as the catastrophic humanitarian consequences of the use and testing of nuclear weapons, including in the Pacific.

Process for achieving a treaty banning nuclear weapons

19. This working group should develop a clear road map, with timelines, for initiating, conducting, and concluding negotiations on a treaty banning nuclear weapons in light of their catastrophic humanitarian consequences and associated risks. The humanitarian pledge, adopted last year in the form of resolution 70/48 of the General Assembly of the United Nations, with the support of 139 States, would be an appropriate starting point for negotiations. The negotiating process should commence in 2016 and conclude within two years. It is important to acknowledge that much preparatory work has already taken place in various forums, including in particular at the three conferences on the humanitarian impact of nuclear weapons.

20. Negotiations should be conducted in accordance with rules of procedure of the General Assembly of the United Nations. There should be no strict requirement for consensus. Our aim must be to establish the highest possible legal standard against nuclear weapons, rather than simply accepting the lowest-common-denominator view in the room. We note the successful processes to achieve the Anti-Personnel Mine Ban Treaty of 1997 and Convention on Cluster Munitions of 2008, and would warmly welcome a similar process for banning nuclear weapons. We question the suitability of the Conference on Disarmament as the negotiating forum, given its long period of stagnation and the fact that two-thirds of the Member States of the United Nations — and all Pacific small island developing States — are excluded from participating fully.

IV. Recommendations and conclusion

21. In summary, we make the following recommendations:

(a) Concerns about the catastrophic humanitarian consequences of the use and testing of nuclear weapons should underpin the work of this group. Moreover, the rights of victims and survivors of nuclear explosions must be a paramount consideration in all our deliberations.

(b) The working group should focus on the unacceptable "legal gap" that exists with respect to the prohibition and elimination of nuclear weapons. (The vast majority of Member States of the United Nations have pledged to cooperate with all relevant stakeholders to fill this gap.)

(c) The working group should begin immediately the practical work of setting out the elements to be contained in a treaty banning nuclear weapons. These should include,

but not be limited to, a full suite of prohibitions and an obligation to eliminate nuclear weapons.

(d) The working group should also develop a clear road map, with timelines, for negotiating such a treaty. This should fully reflect the great urgency of achieving our goal. We cannot continue delaying the prohibition of a weapon that poses a grave threat to all humanity.

(e) The negotiations should be open to all States and conducted in accordance with the standard rules of procedure used in the General Assembly of the United Nations. States should aim to begin the negotiations in the latter part of 2016 and conclude the treaty within two years.

22. We consider the prohibition and elimination of nuclear weapons to be an essential part of our broader struggle to end violence, to promote harmony and friendship among the peoples of the world, to achieve justice and respect for human rights, and to ensure a safe, clean, and healthy environment for the benefit of all present and future generations. In the words of the Secretary-General of the United Nations Ban Ki-moon, ridding the world of nuclear weapons would constitute "a global public good of the highest order". It would free up vast resources to address climate change impacts and challenges as well as to meet the goals of the 2030 Agenda for Sustainable Development. As States in a region that has suffered greatly from the devastating humanitarian consequences of nuclear testing, we are firmly committed to achieving a global ban on nuclear weapons.